

No. 10,848

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EMIL BAILEY,

Appellee,

vs.

JAMES TOZZI, doing business as James
Tozzi & Company,

Appellant.

APPELLANT'S PETITION FOR A REHEARING.

Appeal from the Judgment of the United States District Court,
Northern District of California, Northern Division.

Honorable Martin I. Welsh, Judge Presiding.

SMALLPAGE AND MACOMBER,

LAFAYETTE J. SMALLPAGE,

Stockton Savings and Loan Building, Stockton 5, California,

FORREST E. MACOMBER,

First National Bank Building, Stockton 5, California.

*Attorneys for Appellant
and Petitioner.*

FILED

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PAUL P. O'BRIEN

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Appellant.

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**Appeal from the Judgment of the United States District Court,
Northern District of California, Northern Division.**

Honorable Martin I. Welsh, Judge Presiding.

*To the Honorable Curtis D. Wilbur, Presiding Judge,
and to the Honorable Associate Judges of the
United States Circuit Court of Appeals for the
Ninth Circuit:*

Now comes the defendant and appellant in the above-entitled cause, and petitions this Court for a rehearing, and for grounds thereof states as follows:

That the Court, in its opinion filed March 31, 1945, has followed the error of the Court below in assessing damages for appellant's breach of contract. This Court has tacitly agreed with appellant that the rule

of damages in a case of this kind is as appellant contends. The Court then goes on to do what in effect amounts to a specific enforcement of the contract; that is, this Court decreed that appellee is entitled to the gross profit derived by appellant upon a resale of the potatoes in question. This, too, without any allowance for selling expense incurred by appellant upon a resale of the potatoes.

This Court, in its opinion, stated: "Exhibit D, showing the details of appellant's sale, was before the District Court but not included in the Record on Appeal". As a matter of fact, Exhibit D was not before the District Court. (See: Stipulation regarding evidence and testimony in United States District Court, Transcript of Record, page 45.) This Court undoubtedly meant Exhibit G instead of Exhibit D, but Exhibit G is mentioned in the transcript of record on appeal, page 98, and it definitely appears therefrom that, from said exhibit, there was \$18,205.51 received from the sale of the potatoes, to which was added the \$2500.00 received from Mr. Balley, making a total of \$20,705.51, less \$1660.70 cold storage and \$1085.10 selling expense at \$.10 a sack, left a balance of \$17,959.71, which, minus \$15,733.95, the contract price of the potatoes with Mr. Balley, left a balance of \$2225.76, which, as this Court will note, included the \$2500.00 deposit received from Mr. Balley; so that, when said \$2500.00 deposit is deducted from said \$2225.76, there is an actual net loss to Mr. Tozzi. It appears from the reading of the opinion of this Court, that the Court is in sympathy with the appellee Balley and has fallen into

an error of law in its attempt to sustain the judgment of the District Court.

We respectfully submit that the law, as applied in this case, according to the opinion of the District Court, is a departure from all of the existing authorities as set forth in our opening and closing briefs, and that this Court has, in fact, decreed specific performance of a contract relating to personal property, and appellant respectfully requests this Court to grant a rehearing in this case.

Dated, Stockton, California,

April 30, 1945.

Respectfully submitted,

SMALLPAGE AND MACOMBER,

LAFAYETTE J. SMALLPAGE,

FORREST E. MACOMBER,

By FORREST E. MACOMBER,

*Attorneys for Appellant
and Petitioner.*

CERTIFICATE OF COUNSEL.

I hereby certify that the within petition for a rehearing is not interposed for purposes of delay, and that in my judgment the same is well founded.

Dated, Stockton, California,
April 30, 1945.

FORREST E. MACOMBER,
*Of Counsel for Appellant
and Petitioner.*